SUPREME COURT OF THE UNITED STATES

No. 72-1713

SECRETARY OF THE NAVY, APPELLANT

v.

MARK AVRECH

APPEAL from the United States Court of Appeals for the District of Columbia Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 9, 1973

☆ U. S. GOVERNMENT PRINTING OFFICE, 1973 526178 156

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Question presented	3
Statement	3
The question is substantial	6
Conclusion	11
Appendix A	13
Appendix B	27
Appendix C	29
Appendix D	35
Appendix E	36

CITATIONS

Cases:

Dennis v. *United States*, 341 U.S. 494	8
Dynes v. *Hoover*, 20 How. 65	6
Jordan v. *De George*, 341 U.S. 223	7
Levy v. *Parker*, C.A. 3, No. 71-1917, decided April 18, 1973	6
Screws v. *United States*, 325 U.S. 91	10
Smith v. *California*, 361 U.S. 147	8
Smith v. *Whitney*, 116 U.S. 167	6
United States v. *Frantz*, 2 U.S.C.M.A. 161	7
United States v. *Guest*, 383 U.S. 745	10
United States v. *Holiday*, 4 U.S.C.M.A. 454, 16 C.M.R. 28	8
United States v. *National Dairy Products Corp.*, 372 U.S. 29	7

505-826—73——1

Constitution and statutes:

	Page
United States Constitution:	
First Amendment	5
Fifth Amendment	5
Uniform Code of Military Justice:	
Article 80, 10 U.S.C. 880	3
Article 121, 10 U.S.C. 921	5
Article 133, 10 U.S.C. 933	6
Article 134, 10 U.S.C. 934	*in passim*
Article 137, 10 U.S.C. 937	7
5 U.S.C. 701–706	1
18 U.S.C. 2387	9
28 U.S.C. 1252	2, 6
28 U.S.C. 1331	1
28 U.S.C. 1361	1
D.C. Code (1961 ed., Supp. V) 11–521	1
Miscellaneous:	
Graynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 Hast. L. J. 289 (1971)	10
Manual for Courts-Martial, United States, 1968	7
Stern and Gressman, *Supreme Court Practice*, § 2.5 (4th ed.)	2
Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357 (1968)	8, 9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

SECRETARY OF THE NAVY, APPELLANT

v.

MARK AVRECH

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 13–26) is not yet reported. The oral opinion of the district court delivered on August 20, 1971 (App. B, *infra*, pp. 27–28) is not reported. The written opinion of the district court filed on October 21, 1971 (App. C, *infra*, pp. 29–34) is not reported.

JURISDICTION

Appellee Mark Avrech ("Avrech") brought this civil action in the United States District Court for the District of Columbia in reliance on 5 U.S.C. 701–706, 28 U.S.C. 1331 and 1361, and D. C. Code (1961 ed., Supp. V) 11–521, challenging the validity of his court-martial conviction under Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934. He sought an

order against the Secretary of the Navy ("The Secretary") requiring him to expunge the conviction from Avrech's military records and granting him back pay and other lost benefits. The district judge granted the Secretary's motion for summary judgment on August 27, 1971, and Avrech appealed.

On March 20, 1973, the United States Court of Appeals for the District of Columbia Circuit entered a judgment of reversal (App. D, *infra*, p. 35), together with an opinion holding that Article 134 is unconstitutionally vague. A notice of appeal to this Court (App. E, *infra*, p. 36) was filed with the court of appeals on April 19, 1973. This Court has jurisdiction to review the decision of the court below by way of appeal pursuant to 28 U.S.C. 1252, since a court of the United States has entered a judgment in a civil action to which an officer of the United States is a party holding an Act of Congress unconstitutional. See Stern and Gressman, *Supreme Court Practice* § 2.5 (4th ed.).

STATUTE INVOLVED

Article 134 of the Uniform Code of Military Justice (10 U.S.C. 934) provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

QUESTION PRESENTED

Whether the General Article of the Uniform Code of Military Justice, 10 U.S.C. 934, is unconstitutionally vague.

STATEMENT

On June 24, 1969, appellee Mark Avrech, then a United States Marine serving on active duty in Vietnam, was tried by a special court-martial on charges of having violated Article 80 and Article 134 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. 880, 934 (the latter article known as the "General Article"). Article 80 provides for punishment of *attempts* to commit offenses otherwise punishable under the UCMJ, and Article 134, the General Article, proscribes, *inter alia*, "all disorders and neglects to the prejudice of the good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces."[1] Although he was acquitted on the specification filed under the General Article itself, he was convicted on the specification drawn under Article 80, charging an attempt to commit the offense charged under the General Article, namely attempting to publish to members of the Armed Forces, "with design to promote disloyalty and disaffection among the troops," a certain statement disloyal to the United States.[2] The events leading to the conviction took place at Marble Mountain Air Facility, Danang, Republic of Vietnam, on April 15,

[1] A third clause referring to crimes and offenses not capital is not at issue in this case.

[2] The specification under the General Article alleged that he had completed the publication.

1969, while Avrech was on active duty in the combat zone.

Avrech had enlisted in the Marines in August 1967 and arrived in Vietnam as a private first class in February of 1969. While on night duty with the group supply offices at his base, he typed up a stencil criticizing American involvement in Vietnam and advocating a withdrawal of United States forces if peace could not be attained; the statement also contained Avrech's acknowledgement that the statement of his proposals might lead to his court-martial.[2] On April 15, 1969, Avrech asked Corporal William R. Jackson, who was operating the mimeograph machine in the office, to make copies of the statement or allow him to operate the machine. When Jackson inquired about the contents of the stencil, Avrech replied, "[I]f I tell you that you won't let me run it off" (App. A, *infra*, p. 16). Jackson refused to mimeograph any copies. Later he noticed that Avrech had remained in the office and had printed "The Truth" as a title at the top of the stencil. When Jackson approached him, Avrech handed him the stencil and invited him to read it. After reading the statement, Jackson reproached him and subsequently turned the stencil over to a superior officer.

Upon conviction, Avrech was sentenced to reduction in rank to the lowest enlisted grade, forfeiture of three months' pay, and confinement at hard labor for one month. The commanding officer suspended the

[2] The text of the statement is printed in the opinion below (App. A, *infra*, pp. 15–16).

afinement but the remainder of the sentence was stained by the Staff Judge Advocate and the Judge dvocate General of the Navy.[1]

On December 16, 1970, Avrech sought relief in the nited States District Court for the District of Co-nbia. In addition to contending that he had been nied due process of law by reason of insufficient idence of criminal intent or commission of an at-npt, and in addition to arguing that his Vietnam tement was protected by the First Amendment, vrech asserted that the General Article on its face d as applied is unconstitutionally vague and over-oad. He sought an order requiring the Secretary of e Navy to expunge any record of his conviction as valid and to restore to Avrech all pay and benefits t because of the conviction. On August 27, 1971, mmary judgment was granted against Avrech. In anting the Secretary's motion for summary judg-nt, the district court held that Avrech's statement s not protected by the First Amendment and that e General Article is not unconstitutionally vague App. B, *infra*, pp. 27–28; App. C, *infra*, pp. 29–34).

The court of appeals, in an opinion by Mr. Justice ark filed on March 20, 1973, reversed on the ground at the General Article does not comply with the fth Amendment, holding that the relevant portions Article 134 give "no fair warning of the conduct

[1] On June 26, 1970, Avrech was given a bad conduct dis-arge from the United States Marine Corps after a second l unrelated special court-martial conviction on August 18, 9, for having stolen a camera from a Marine Corps Ex-ange, in violation of Article 121 of the UCMJ, 10 U.S.C. 921.

it proscribes and fail to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities" (App. A, *infra*, p. 20). The Secretary of the Navy now appeals that decision to this Court pursuant to 28 U.S.C. 1252.

THE QUESTION IS SUBSTANTIAL

The court of appeals has held unconstitutional an act of Congress that forms an important part of the Uniform Code of Military Justice and has its roots in statutes pre-dating the adoption of the Constitution itself. If sustained, the decision below would have a profound impact on the orderly administration of justice within the military establishment. Indeed, should such a ruling be applied retroactively, the number of convictions affected thereby would run far into the thousands.

As the court below recognized (App. A, *infra*, pp. 17–18), the General Article, which it has declared unconstitutionally vague on its face,[*] is traceable to pre-Revolutionary British military law and in one form or another has been part of American military codes, enacted by Congress, since the Foundation of the Republic. In addition, this Court has expressly upheld these predecessor statutes against attacks similar to the one accepted below. *Smith* v. *Whitney*, 116 U.S. 167, 182–186; *Dynes* v. *Hoover*, 20

[*] The same result was reached by the Court of Appeals for the Third Circuit in *Levy* v. *Parker* (No. 71-1917, decided April 18, 1973), where the court held both the General Article and Article 133 (proscribing "conduct unbecoming an officer") void for vagueness. The government is appealing that decision as well to this Court pursuant to 28 U.S.C. 1252.

How. 65. The opinion below concededly also conflicts (App. A, *infra*, pp. 19–20, 23–24) with decisions of the United States Court of Military Appeals upholding the constitutionality of Article 134 against the same claim. See, *e.g.*, *United States* v. *Frantz*, 2 U.S.C.M.A. 161 (1953). Accordingly, this Court should accept jurisdiction of this appeal from the contrary holding below to resolve this important constitutional issue.

Article 134 "must be judged * * * not in vacuo, but in the context in which the years have placed it." *United States* v. *Frantz*, *supra*, 2 U.S.C.M.A. at 163. An ascertainable standard of proscribed conduct has been established by the terms of Article 134, its history, case law, and the approximately seventy specific offenses cognizable under the Article which have been explicitly included in the *Manual for Courts-Martial, United States, 1968* (Appendix 6—Forms for Charges and Specifications). While, as the opinion below points out, "[t]he Manual is not exhaustive of Article 134 misconduct" (App. A, *infra*, p. 22), the warnings are sufficiently definite "when measured by common understanding and practices." *Jordan* v. *De George*, 341 U.S. 223, 231–232. This conclusion is reinforced by the fact that the statute is addressed to the "common understanding" of a limited class, the military. Cf. *United States* v. *National Dairy Products Corp.*, 372 U.S. 29. Indeed, as part of the orientation of all military personnel, the provisions of the UCMJ—and specifically the General Article—are explained in detail. See Article 137 of the UCMJ, 10 U.S.C. 937, requiring that these provisions be "carefully explained to each enlisted member at the time of his entrance on active duty,

505-826—73——2

or within six days thereafter" and be "explained again after he has completed six months of active duty."

We observe that Avrech, an enlistee with almost two years' service prior to the commission of his offense, was evidently aware at the time he attempted to publish the leaflet that his actions might lead to a court-martial conviction.[6] Moreover, adequacy of notice has been further insured by judicial constructions limiting the reach of the General Article to that conduct "which is directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline." *United States* v. *Holiday*, 4 U.S.C.M.A. 454, 456, 16 C.M.R. 28, 30 (1954).

While there may be some degree of imprecision in the General Article, the lack of practical legislative alternatives has been noted. See Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357, 363–364 (1968).[7] The court of appeals

[6] Avrech acknowledged in the statement his understanding of its possible consequences (App. A, *infra*, p. 16)—an awareness which he reacknowledged at his court-martial. The fact that Avrech may not have predicted the actual court-martial conviction does not establish lack of notice. See *Smith* v. *California*, 361 U.S. 147; *Dennis* v. *United States*, 341 U.S. 494, 515.

[7] The opinion below refers to this commentary as an example of the position of the "'old soldiers' themselves" that Article 134 is unduly indefinite when judged by the void-for-vagueness cases (App. A, *infra*, p. 21). We note that the cited commentator, Mr. Wiener, concludes that the General Article is reasonably well-settled and understood and that arguments of vagueness are counter-balanced by the pre-constitutional history of the articles as well as by the unique nature and problems of the armed forces. He also poses the question (54 A.B.A.J. at 363–364):

"[h]ow could Congress possibly legislate in minute detail

suggests that other Articles of the Code would be more suitable for controlling much of the conduct now within the scope of the General Article. This call for alternative means is not without its own problems, however. For example, it is suggested (App. A, *infra*, pp. 25–26, n. 4) that Avrech's statement could better have been punished under the sedition statute, 18 U.S.C. 2387, which applies even to non-servicemen but requires "a clear and present danger that the activities in question will bring about the substantive evils"—such as insubordination and mutiny—delineated in the statute. Had Avrech been tried under this section, he might now stand convicted of sedition rather than attempting to publish a disloyal statement. To the extent that the "clear and present danger" test of Section 2387 imposes a more rigorous standard than the "direct and palpable prejudice to good order and discipline" test of the General Article, the difference in the formulations would seem to be justified by the gravity of the respective crimes proscribed, and the imperative need to have a code of conduct applicable exclusively to soldiers on active duty with the armed forces.

While some questions could be conceived to show

---

what are 'disorders and neglects to the prejudice of good order and discipline,' or specify with particularity 'all conduct of a nature to bring discredit upon the armed forces'? Inevitably, new disorders and new misconduct not falling within the legislative enumeration but clearly comprehended under the existing phraseology would occur to the ingenuity of those subject to military law."

the possible vagueness of the application of the General Article in hypothetical situations, in practical effect no one punished under the statute can reasonably argue lack of notice. As one commentator observed, "in reviewing many thousands of cases involving article 134 and its predecessors, not a single instance has been found in which it could be concluded that no one could reasonably believe that the conduct charged was not in some way prejudicial to discipline or discreditable to the service." Graynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article,* 22 Hast. L. J. 259, 288–289 (1971). Other commentators have reached the same conclusion. Wiener, *Are The General Military Articles Unconstitutionally Vague?, supra,* 54 A.B.A.J. at 364. In view of the requirement of some sort of *mens rea* in the standard specification framed under the General Article and applied to Avrech,[*] there is no reason to invalidate the statute for vagueness, especially in a case where the defendant's conduct was clearly not privileged and he knew that what he was doing was wrong. Cf. *United States* v. *Guest,* 383 U.S. 745, 754, 785–786 (noting that a scienter requirement can save a criminal statute from being held void for vagueness); *Screws* v. *United States,* 325 U.S. 91.

---

[*] The model specification promulgated for this kind of conduct under the General Article, which was followed in this case, provides an allegation that the disloyal statement was published "with design to promote disloyalty and disaffection among the troops."

CONCLUSION

Probable jurisdiction should be noted and the case set for oral argument.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

PHILIP A. LACOVARA,
Deputy Solicitor General.

JEROME M. FEIT,
HARVEY STONE,
Attorneys.

JUNE 1973.

APPENDIX A

United States Court of Appeals
for the District of Columbia Circuit

No. 71-1841

MARK AVRECH, APPELLANT

v.

THE SECRETARY OF THE NAVY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided March 20, 1973

Dorian Bowman and *David Bain* for appellant.

Harold H. Titus, Jr., United States Attorney, and *John A. Terry, Michael A. Katz* and *James F. McMullin*, Assistant United State Attorneys, for appellee.

Before Mr. JUSTICE CLARK,* and WRIGHT and WILKEY, *Circuit Judges.*

Mr. Justice CLARK: Appellant, Mark Avrech, brought this suit seeking a declaration that his 1969 court-martial conviction was constitutionally invalid

* Mr. Justice Tom C. Clark, United States Supreme Court, Retired, sitting by designation pursuant to 28 U.S.C. § 294 (a) (1970).

under the First and Fifth Amendments and an order that the conviction be expunged from his military record and that he recover all pay and benefits lost by reason of the conviction.[1] Avrech was convicted of violating Article 134 of the Uniform Code of Military Justice, known as the "General Article,"[2] which imposes criminal sanctions on "all disorders and neglects to the prejudice of the good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces."[3] More specifically, Avrech was charged with attempting to publish and publishing a statement disloyal to the United States, with design to promote disloyalty and disaffection among the troops. After pleading not

---

[1] The jurisdiction of the District Court is not questioned here nor is the existence of a case or controversy. We find both jurisdiction and justiciability present.

[2] Article 134, General Article, 10 USC 934:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

The third clause, referring to crimes and offenses not capital, is not in issue in this case. References in the opinion to Article 134 or the General Article are meant to encompass only the first two clauses.

[3] Maximum punishments under the Uniform Code are fixed in the Manual for Courts Martial by Executive Order of the President. Article 134 punishments run from 20 years imprisonment and dishonorable discharge for assault with intent to commit murder or rape to one month's imprisonment and forfeiture of two-thirds of one month's pay for, e.g., appearing in an unclean uniform. The offense charged here carries a three year maximum sentence. See Table of Maximum Punishments, *Manual for Courts-Martial*, 1969.

guilty, he was acquitted of publishing but found guilty of attempting to publish the article. He complains that the language of Article 134 is unconstitutionally vague and overbroad under the Fifth Amendment in that the Article did not give him fair notice that his contemplated statement was forbidden; he also urges that his statement was protected free speech under the First Amendment. The District Court upheld his conviction. We reverse on the Fifth Amendment ground.

1. *Background of the Prosecution:*

Avrech enlisted in the Marines in 1967 and was sent to Vietnam in February, 1969, with the rank of private first class. While stationed at Danang and on night duty with the group supply offices, Avrech typed up a stencil criticizing American involvement in Vietnam. It stated:

> "I've been in this country now for 40 days and I still don't know why I'm here. I've heard all the arguments about communist aggression and helping the poor defenseless people. I've also heard this three years ago. The entire Vietnamese Army will switch to a pacification role in 1967 and leave major fighting to the American troops. (Statement of South Vietnamese Foreign Minister, L.A. Times, Nov. 18, 1966.) It seems to me that the South Vietnam people could do a little for the defense of their country. Why should we go out and fight their battles while they sit home and complain about communist aggression. What are we cannon fodder or human beings? If South Vietnam was willing to go it on their own back in 1964 what the hell is the matter with them now? The United States has no business over here. This is a conflict between two different politically minded groups. Not a direct attack on the United States. It's not worth killing American

boys to have Vietnam have free elections. (Former Vice President Richard M. Nixon, L.A. Times, December 31, 1967.) That was our present leader of this country and now he has the chance to do something about the situation and what happens. We have peace talks with North Vietnam and the V.C. That's just fine and dandy except how many men died in Vietnam the week they argued over the shape of the table? Why does this country think that it can play games with peoples lives and use them to fight their foolish wars, I say foolish because how can you possibly win anything like a war by destroying human lives. Human lives that have no relation at all to the cause of the conflict. Do we dare express our feelings and opinons with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial? We must strive for peace and if not peace then a complete U.S. withdrawal. We've been sitting ducks for too long.******SAM*"

Sometime thereafter Avrech asked his immediate superior, Corporal William R. Jackson, who was operating the mimeograph machine in their office, to duplicate the statement or permit him to do so. When Jackson inquired as to the content of the stencil, Avrech replied: "If I tell you that you won't let me run it off." Jackson then refused. Later Avrech let Jackson read the stencil; the latter reproached Avrech and subsequently turned it over to a superior officer. This prosecution followed.

Avrech was sentenced to confinement at hard labor for one month, reduction in rank, and forfeiture of pay for three months. The Commanding Officer suspended the confinement but the remainder of the sentence was sustained by the Staff Judge Advocate and the Judge Advocate General of the Navy. On

June 26, 1970, Avrech received a bad conduct discharge after a second and unrelated special court-martial conviction for having stolen a camera from the Navy Exchange. The Navy Court of Military Review, in ordering the discharge, took into account Avrech's conviction here under attack.

The District Court granted the Government's motion for summary judgment, holding that Avrech's statement was not protected by the First Amendment and that Article 134 provides a sufficiently definite warning as to the proscribed conduct and a sufficiently ascertainable standard of guilt to survive the constitutional vagueness challenge.

2. *History and Components of Article 134:*

We need not pause to detail the history of Article 134. Its antecedents go back to British military sources prior to American Independence. In this country the Constitution entrusted to the Congress the power "to make Rules for the Government and Regulation of the land and naval Forces," Article I, § 8, Cl. 14. In 1950, pursuant to this grant, the Congress adopted the Uniform Code of Military Justice. Article 134 of the Code includes three clauses which prohibit (1) "all disorders and neglects to the prejudice of good order and discipline in the armed forces;" (2) "all conduct of a nature to bring discredit upon the armed forces;" and, (3) crimes and offenses not capital (this last clause not being here in issue). The General Article is the American version of an older provision of military law known by the British as the "Devil's Article." A distinguished commentator and leading authority in the field, William Hough, made no attempt to define the "disorders" proscribed in the Article's antecedents, only characterizing them as acts that "more usually take place under

circumstances unconnected with duty and are esteemed disorderly or insubordinate conduct." The Practice of Courts-Martial (1825) at 634. Hough's examples of "disorders" included habitual insubordinate language and conduct at the mess, drunkenness, abusing and striking a sentry on duty, and adultery with the wife of a soldier. Id. at 642. Hough defined "neglect" to mean "neglecting to observe standing orders and regns., or, those orders which are issued and intended to be carried into immediate execution or shortly after." Id. at 633. His examples of "neglect" including keeping the books in a negligent manner, not reporting infectious diseases to the proper authority, and allowing government goods to be stolen. Id. at 641. The second clause of Article 134, prohibiting "all conduct of a nature to bring discredit upon the armed forces," was originally enacted for the "single purpose" of subjecting retired enlisted men to court-martial punishment for conduct similar to that proscribed under Article 133 for retired officers. Both clauses have been expanded beyond recognition and now encompass the residue of offenses that have sprung up with what were thought to be the necessities of disciplining the ever-increasing population of the armed forces. While the United States Court of Military Appeals has held that conduct condemned by the General Article must be "directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline," *United States* v. *Holiday*, 4 USCMA 454, 456 (1954), the Article now encompasses over seventy specific offenses. The listed offenses range from "abusing a public animal" to "disloyalty to the United States" with such offenses as dishonorably failing to pay a debt, malingering, straggling, pandering, and assault with intent to

commit murder in between. This crazy quilt of offenses is patched together in the Manual for Court-Martial, issued as an Executive Order of the President under Article 836 of the Code, which authorizes the President to prescribe "procedures, including modes of proof, in cases before courts-martial." The latest manual, promulgated by an Executive Order of the President, is dated September 11, 1968, and known as Manual for Courts-Martial, United States, 1968. The military forces have "amplified" (to use a word employed in the Government's brief) the General Article by including in Appendix 6—Forms for Charges and Specifications—the seventy-odd charges described above. The Executive Order "prescribing" the Manual has saving clauses covering prior investigations, trial after arraignment or other actions begun before its effective date. A further proviso excludes "any act done or omitted prior to the effective date of this manual which was not punishable when done or omitted."

3. *The Theory of the Armed Forces:*

(1) The Government argues that the Article 134 language here under scrutiny has acquired a core of settled and understandable content through long tradition and the listing of specific offenses in the Manual. *United States* v. *Frantz*, 2 USCMA 161 (1953). In the Frantz case the Court of Military Appeals assumed that civilian vagueness standards apply to the military but concluded that the Article had achieved a meaning sufficiently settled and definite to overcome the vagueness claim. The Government also points to *Dynes* v. *Hoover*, 61 U.S. 65 (1858), holding that a military law provision comparable in scope to the General Article was not subject to abuse because the nature of the proscribed conduct and its punishment were

"well known by the practical men in the navy and army." At 82. And, Winthrop, *Military Law and Precedents* (2d Edition 1920), in speaking of military custom, includes those service-wide practices which have prevailed for a long period of time and which are "well defined, equitable and uniform in application." At 42–43.

We believe, however, that today Article 134 gives no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities. Interpretation of the General Article through the Manual to proscribe some seventy explicit offenses, rather than evidencing settled and understandable meaning, indicates just the contrary. For example, not until 1951 did the disloyalty charge prosecuted here become a badge of infamy within reach of the Manual. And even *Frantz*, supra, did not crystallize the phantom offenses that could be included within Article 134, for we find the 1968 edition of the Manual continues to expand their number. Indeed, the only apparent purpose of Article 134 is to act as a catch-all for varied types of unforeseen misconduct not otherwise covered by the Code. Though servicemen may be instructed on the meaning and proper applications of Article 134, the Article's development demonstrates that its coverage has no limits. At most, instruction could only inform servicemen of the specific conduct deemed punishable under the Article in the past and of the fact that comparable misconduct may likewise be punished. And often this would not shed much light on the peculiar facts involved in the act under scrutiny since even conduct listed in the Manual must be found prejudicial to good order and discipline or service discrediting. *United States* v. *Gittens*, 8 USCMA 673 (1953). Nor can we approve

the practice under Article 134 of judicially creating new offenses by analogizing them to previously recognized offenses under that Article. See Everett, Article 134, Uniform Code of Military Justice—A Study in Vagueness, *37 North Carolina L. Rev.* 142, 152–153, 157–158 (1959). For example, the acceptance of money for transporting passengers in a government vehicle, conduct not mentioned in the Manual under Article 134, has been analogized to graft and bribery (three year offenses). United States v. Alexander, 3 USCMA 346 (1953). The Supreme Court recently condemned the "punishment by analogy" approach in *Papachristou* v. *City of Jacksonville,* 405 U.S. 156 168–169 (1972): "Such crimes [derived by analogy], though long common in Russia, are not compatible with our constitutional system."

Moreover, the old authorities cited bear little weight. Not only has the General Article been expanded beyond recognition, but the greater percentage of our armed forces are today non-career personnel. They are draftees or enlisted personnel with little military experience. Even the "old soldiers" themselves say that the language in Article 134 judged by the void-for-vagueness cases is "unduly indefinite." Wiener, Are the General Military Articles Unconstitutionally Vague? 54 *ABA Journal* 357, 363 (1968). Furthermore, the highest of judicial authority in the Army recommends the abolition of Article 134 because "we can't defend our use of it in this modern world. It probably could not withstand a 'vague and indefinite' attack in the Supreme Court." Kenneth J. Hodson (Chief Judge, United States Army Court of Military Review), "Perspective, The Manual for Courts-Martial, 1984," 57 *Military Law Review* 1, 12 (1972). These two officers, the former a distinguished con-

stitutional authority as well as a World War II Colonel in the Judge Advocate General's Department, and the latter, himself a renowned former Judge Advocate General as well as the present Chief Judge of the Army's highest court, speak both impressively and authoritatively. And the opinions of the Military Court of Appeals add more weight to this conclusion. It has held repeatedly that the Manual does not limit or confine Article 134. The Manual is not exhaustive of Article 134 misconduct; its crazy quilt of offenses does not cover Article 134's bed. See, e.g., *United States* v. *Sadinsky*, 14 USCMA 563 (1964). Further, the inclusion of specific conduct in the Manual specifications does not necessarily mean the conduct is punishable under the Article. *United States* v. *Alexander*, 12 USCMA 26 (1960). The Court of Military Appeals has held that it is reversible error for the court-martial law officer not to instruct that acts charged under Article 134 must be found either to have prejudiced good order and discipline or have discredited the armed forces, even though the charges against the accused track the language of a Manual specification. *United States* v. *Gittens*, supra. In *United States* v. *Smith*, 13 USMCA 105, 119 (1962), the Court held that Congress never delegated the power to make substantive rules by way of the Manual and that the Manual was intended merely to serve as a substitute for legal research facilities insofar as it includes rules of substantive law. In the same year the court refused to permit the use of an erroneous instruction on self-defense, though prescribed by the Manual; since it was a matter of substantive law rather than procedure, the Manual did not control. *United States* v. *Acosta-Vargas*, 13 USMCA 388. These cases demonstrate it is neither necessary nor sufficient that a

serviceman's conduct fit a Manual specification in order for him to incur criminal liability under Article 134. Nothing could point more accusingly to the vagueness of Article 134 than for the Court of Military Appeals to say that in the final analysis, the Manual is but a mini-digest of the roving character of Article 134, whose vague and indefinite language is absolutely controlling. Clearly the broad net of Article 134 will catch an accused though the Manual does not.

(2) Nevertheless, the Government says the clear knowledge of Avrech that his actions might lead to a court-martial shows that he had fair warning that Article 134 prohibited his proposed action. We find the law to the contrary. The fear, if any, which Avrech had that his action might lead to his court-martial does not demonstrate that he knew his actions were covered by Article 134. Nor does it provide a substitute for the Article's vague and indefinite language. *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). There the Court found "it irrelevant that petitioners at one point testified that they had intended to be arrested," since "the record is silent as to what petitioners intended to be arrested for * * *." Whether a statute affords "fair warning . . . must be made on the basis of the statute itself and the other pertinent law, rather than on an ad hoc appraisal of the subjective expectations of particular defendants." At 355–356, n.5.

(3) The Government says further that civilian standards of specificity do not apply to the military. We have concluded that they do. Indeed, the Court of Military Appeals assumed in *Frantz*, supra, that civilian standards applied and found "the conceivable presence of uncertainty" in the first two clauses of Article 134. However, it found that the Article had

acquired the "core of a settled and understandable content of meaning" that established standards "well enough known to enable those within . . . [its] reach to correctly apply them." 2 USMCA at 163. As we have noted, we disagree with this conclusion. We prefer to accept the import of *United States* v. *Howe*, 17 USMCA 165, 178–179 (1967), where the Court accepted the application of general Supreme Court standards in civilian cases without indicating any departure from those standards in the name of military necessity. Likewise, we follow the view of the United States Air Force Board of Review in *United States* v. *McLeod*, 18 CMR 814 (1954) and the Coast Guard Board of Review in *United States* v. *Barker*, 26 CMR 838 (1958). Both applied the requirements of the Fifth Amendment to military courts-martial.

It is true that the Supreme Court originally adopted a hands-off policy towards courts-martial. As late as 1950 the Court quoted with approval *re Grimley* (United States v. Grimley), 137 U.S. 147, 150 (1890), that "the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial . . . The single inquiry, the test, is jurisdiction." *Hiatt* v. *Brown*, 339 U.S. 103 at 111. However, in the same year, in a unanimous opinion by Mr. Justice Douglas, the Court stated that if a court-martial denies a defendant the opportunity to raise a defense then it has no jurisdiction to find guilt. *Whelchal* v. *McDonald*, 340 U.S. 122, 124. Three years later in *Burns* v. *Wilson*, 346 U.S. 137 (1953), Chief Justice Vinson in an opinion joined by three other members of the Court, stated that federal courts are empowered to hear a denial of due process by the military, if the latter has refused to hear such claims or has misapplied constitutional requirements. Justices Black

and Douglas dissented because they thought the military had misapplied civilian due process standards. Finally, Mr. Justice Black in *Reid* v. *Covert*, 354 U.S. 1, 37 (1957), said the applicability of the Bill of Rights to the military was "as yet . . . not . . . clearly settled." And in *O'Callahan* v. *Parker*, 395 U.S. 258, 265–266 (1969) the Court through Mr. Justice Douglas posed the query whether Article 134 satisfies the standards of vagueness developed by civilian courts, but he did not pause to answer.

The question, however, seems settled in this Circuit by *Kauffman* v. *Secretary of the Air Force*, 415 F. 2d 991, 997 (1969), where the court said:

> "We hold that the test of fairness requires that military rulings on consitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule."

It is true that this proviso excepts from Supreme Court standards those situations where conditions peculiar to military life require a different rule. However, the trial court apparently found no such conditions present in this case since it applied Supreme Court standards. None have been shown here. Moreover as General Hodson points out, other Articles are available to cover the offenses now punished under the General Article, e.g., Articles 92 and 128, which would serve the military just as well.[4] 57 *Military Law*

---

[4] The availability of effective, and we might add, preferable alternatives to punishing disloyal statements under Article 134 is evidenced by the companion cases of *United States* v. *Daniels*, 19 USCMA 529 (1970), and *United States* v. *Harvey*, 19 USCMA 539 (1970). *Harvey* indicates that disloyal statements are subject to punishment under 18 U.S.C. 2387 as well as Article 134. *Daniels* holds that conviction under Sec. 2387 requires "'a clear and present danger that the activities in ques-

(Continued)

Rev., 1, 12. The Government, however, questions t
application of Supreme Court standards to milita
personnel stationed in a combat zone. We readi
understand its apprehension, but the argument
beside the point because there are Articles other tha
134 that fully and satisfactorily govern combat situ
tions. Two Articles, 92 and 99, come to mind. Th
punish failure to obey any lawful order or regulati
and misbehavior before the enemy, respectively.
General Hodson so clearly says: "We don't rea
need" Article 134. It is purely and simply a hou
keeping device and the specific conduct which it h
been held to prohibit can be as effectively controll
through the utilization of other Articles of the Co
It therefore appears to us that there is no valid mi
tary justification for suspending the application of t
constitutional right of fair warning to Article 134.
follows that the General Article must fall.

Reversed

(Continued)
tion will bring about the substantive evils' delineated in
statute [insubordination, mutiny, refusal of duty, etc.]"
contrast, Article 134 merely requires a finding that the st
ment was prejudicial to good order and discipline or ser
discrediting. In view of the *Harvey* court's recognition of
vagueness problems involved—i.e., "Words by themselves
not always reveal their character . . . The Vietnam war
evolved a vast outpouring of written and oral comment.
language of many of the comments is poised on a thin
between rhetoric and disloyalty to the United States."
544)—we doubt the military would consider itself prejudi
if forced to rely on Sec. 2387, incorporating as it does a "c
and present danger" test.

APPENDIX B

Opinion of District Court—August 20, 1971

[SAME TITLE]

WASHINGTON, D.C.,
Friday, August 20, 1971.

The above-entitled matter came on for hearing before His Honor HOWARD F. CORCORAN, United States District Judge, at 10:00 o'clock a.m.

Appearances:

For the Plaintiff: David Rein, Esq., and *Dorian Bowman,* Esq.

For the Defendant: Michael A. Katz, Esq.

EXTRACT FROM TRANSCRIPT OF PROCEEDINGS

(Judge's Oral Opinion Only)

The COURT. Well, I am not prepared at this particular point, gentlemen, to render a learned opinion, but I have been over the papers very carefully, and I am of the opinion that the plaintiff's motion for summary judgment should be denied, and the government's motion for summary judgment should be granted.

I think the court has to take jurisdiction under the Kaufman case, and that we have to look at these proceedings to see whether or not they do meet the constitutional standards set out by the Supreme Court.

But the way I size up the case, I think this plaintiff's actions have to be viewed in the light of all of the surrounding circumstances. As I said in the course

of the argument, what might not be objectionable i
one setting could be objectionable in another setting
Recognizing that First Amendment rights are no
absolute, particularly in connection with the affairs o
the military, I think that the triers of fact cannc
be criticized for having found this man guilty a
charged when we consider all of the circumstance
under which the statements were made.

They were made in Danang, at Fire Base No.
while the unit was in combat. A perfectly proper in
ference to be drawn from those statements is tha
they were designed to undermine the morale of th
unit while the unit was under fire, and I cannot quar
rel with the triers of fact that that is the inferenc
they drew from the circumstances.

As to the vagueness, I have just finished studyin
very carefully Mr. Weiner's article in the *America*
Bar Association Journal, and I am quite impresse
with his reasoning that this Article 134 can withstan
the attack on vagueness.

So those are the underlying reasons why I rule as
do.

If I have time—I have only a few more days o
the bench for the time being—if I have time, I wi
prepare a short memorandum which can serve as th
basis of an appeal, if you wish to take it. I will n
guarantee to get it out, but I will do my best.

(Whereupon, at this point the court adjourned.)

APPENDIX C

Opinion of District Court—October 21, 1971

[SAME TITLE]

This case came before the Court on cross-motions for summary judgment. The facts are noted briefly.

I

Plaintiff is a former member of the United States Marine Corps. In 1969 while serving with the Marine Corps in the Republic of Viet Nam he was convicted by a Marine Corps special court-martial of having attempted to utter a disloyal statement with design to promote disloyalty and disaffection among the troops in violation of Articles 80 and 134 of the Uniform Code of Military Justice. (UMCJ) 10 U.S.C. §§ 880, 934.[1]

[1] Article 80 merely provides that an attempt to commit an offense is a crime and a person guilty of such a crime may be punished "as a court-martial may direct." Plaintiff was convicted under Article 80 of attempting to violate Article 134 which reads:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

The statement which led to plaintiff's conviction was typed on a mimeograph stencil and presented for printing by the plaintiff while he was stationed at Marble Mountain Air Facility, Danang, a forward base in the war zone. In his statement, plaintiff expressed dissent from United States policy and objectives in South Viet Nam, strongly suggested that the United States should not be fighting in South Viet Nam and urged that "we must strive for peace and if not peace then a complete U.S. withdrawal."

As a result of his conviction, plaintiff was sentenced to be reduced to pay grade E–1, to forfeit $70 pay per month for three months and to be confined at hard labor for one month. The convening authority suspended that portion of the sentence adjudging confinement.

Plaintiff seeks (1) a declaration that his court-martial conviction is invalid as violative of the First and Fifth Amendments to the Constitution; (2) restoration of all pay and benefits of which he was deprived by virtue of said special court-martial conviction and (3) an order expunging said court-martial from all military records.

II

The government argues that the Court lacks jurisdiction to review the plaintiff's conviction because he is not now in custody and because his less than honorable discharge did not stem from the conviction here at issue. But the Court considers that *Kauffman* v. *Secretary of Air Force,* 415 F.2d 991 (1969) compels a finding that the Court has jurisdiction. In *Kauffman* our Court of Appeals said that habeas corpus to secure release from confinement is not the exclusive form of collateral attack on a court-martial judgment in civilian courts. The Court held that it had

jurisdiction to review Kauffman's court-martial conviction for constitutional error where Kauffman's conviction had resulted in his discharge from the armed forces under other than honorable conditions. The rational of *Kauffman* would appear to apply equally to the instant case. While plaintiff's court-martial conviction in this case did not cause his discharge under other than honorable conditions, the Court believes that plaintiff's conviction for publishing disloyal statements in a war zone may result in a continuing disability which will affect him in civilian life in a manner similar to the "stigma experienced by a recipient of a discharge under other than honorable conditions." Everett, *Military Administrative Discharges—the Pendulum Swings*, 1966 Duke L.J. 41, 50.

The government further contends that the scope of review on collateral attack of a court-martial is limited to an inquiry as to whether the military authorities "dealt fully and fairly" with the claims raised. *Burns* v. *Wilson*, 346 U.S. 137, 142 (1953). However, our Court of Appeals in *Kauffman, supra*, determined that "*Burns* did not apply a standard of review different from that currently imposed in habeas corpus review of state convictions," *Kauffman, supra*, at 997, and held that this standard required that "military rulings on constitutional issues conform to Supreme Court standards." *Id.* Since the Court views *Kauffman* as controlling, it must examine plaintiff's court-martial conviction to determine whether it conforms with prevailing Supreme Court standards of constitutionality.

III

Plaintiff asserts that his court-martial conviction is unconstitutional because Article 134 of the Uniform Code of Military Justice under which he was con-

victed,' on its face and as applied, is vague and overbroad in violation of the Due Process Clause of the Fifth Amendment. He specifically argues that the general language of the Article, i.e., "all disorders and neglects to the prejudice of good order and discipline," does not, with sufficient accuracy, define that conduct which is prohibited.

The Court is of the opinion that Article 134 is not unconstitutionally vague. The language of Article 134 "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan* v. *DeGeorge*, 341 U.S. 223, 231–32 (1951). The Court of Military Appeals, in sustaining the constitutionality of Article 134, noted that the Article—

> must be judged . . . not in vacuo, but in the context in which the years have placed it. That the clauses under scrutiny have acquired the core of a settled and understandable content of meaning is clear from the no less than forty-seven different offenses cognizable thereunder explicitly included in the Table of Maximum Punishments of the Manual [for Courts-Martial], pages 224–227. Accordingly, we conclude that the Article establishes a standard "well enough known to enable those within . . . its reach to correctly apply them." *United States* v. *Frantz*, 2 U.S.M.A. 161, 163 (1953). (citations omitted)

Considering the terms of Article 134, its history, the provisions of the various manuals for courts-martial (*see* para 213, Manual for Courts-Martial, 1951) and interpretive case law, it is clear that the Article establishes an ascertainable standard of guilt and therefore is not void for vagueness. *See generally*, Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357 (1968).

---

[1] *See* note 1 *supra*.

Plaintiff, further alleges that his conviction is un-
nstitutional because it was based upon statements
de by him which are protected by the First Amend-
nt. Even under the rule laid down in *Kauffman,*
ora, as to the nature of civilian review of courts-
rtial for constitutional sufficiency, the Court finds
plaintiff's free speech claims without merit.
While the United States Court of Military Appeals
s recognized that the First Amendment is applica-
to servicemen, *United States* v. *Voorhees,* 4
SCMA 509, 16 CMR 83 (1954), it has also realized
t the right of free speech must be balanced against
military's peculiar need to safeguard discipline
l morale. *United States* v. *Giordano,* 15 USCMA
, 166–67, 35 CMR 135 (1964). Indeed the Supreme
urt itself has recognized that "those subject to mili-
y discipline are under many duties and may not
im many freedoms that we hold inviolable as to
se in civilian life." *Board of Education* v. *Barnette,*
U.S. 624, 642, note 19 (1943). First Amendment
hts are not absolute even in the civilian sphere.
gulation as to the time, place and manner of exer-
e is proper where reasonably necessary to protect a
id public interest. *Cox* v. *Louisiana,* 379 U.S. 536,
(1965).
Our nation has a valid interest in insuring that its
litary services are able to maintain the military
cipline essential to an effective fighting force. The
otection of this interest necessarily entails placing
ater limits on the serviceman's right of free speech.
seems clear that plaintiff's conduct in attempting
publish his statement to the members of a military
it which was at that time engaged in active military
mbat operations presented a distinct threat to the
intenance of military discipline and morale within
unit. In view of the circumstances of the attempted

publication, this Court does not find that the conviction of the plaintiff violated his First Amendment rights.

Plaintiff's motion for summary judgment is denied and defendants motion for summary judgment is granted.

HOWARD F. CONCORAN, *Judge.*

Dated: OCTOBER 21, 1971.

APPENDIX D

United States Court of Appeals for the District of Columbia Circuit

(No. 71-1841)

MARK AVRUCH, APPELLANT

v.

SECRETARY OF THE NAVY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: *Mr. Justice Clark,** and *Wright* and *Wilkey*, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed in accordance with the opinion of this Court filed herein this date.

Per Curiam.

For the Court:

HUGH E. KLINE, *Clerk*.

Dated: MARCH 20, 1973.

Opinion for the Court filed by Justice Clark.

Filed Mar. 20, 1973.

*Mr. Justice Tom C. Clark, United States Supreme Court, Retired, sitting by designation pursuant to 28 U.S.C. § 294(a) (1970).

APPENDIX E

United States Court of Appeals for the District of Columbia Circuit

(No. 71-1841)
(C.A. No. 3664-70)

MARK AVRECH APPELLANT

v.

SECRETARY OF THE NAVY APPELLEE

NOTICE OF APPEAL

Notice is hereby given that appellee, the Secretary of the Navy, appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1252, from the judgment of this Court entered March 20, 1973, reversing the judgment of the District Court.

HAROLD H. TITUS, JR.
United States Attorney.

JOHN A. TERRY
Assistant United States Attorney.

JAMES F. MCMULLIN
Assistant United States Attorney.

U.S. GOVERNMENT PRINTING OFFICE: 1973

FILED
JAN. 30

Supreme Court of the United States

October Term, 1972

No. 72-1713

SECRETARY OF THE NAVY,

Appellant,

v.

MARK AVRECH,

Appellee.

On Appeal from the United States Court of Appeals
for the District of Columbia Circuit

MOTION TO AFFIRM

Dorian Bowman
Kalkines, Arky, Zall & Bernstein
30 East 42nd Street
New York, New York 10017

David Rein
Porter and Rein
430 National Press Building
14th & F Streets, N.W.
Washington, D.C. 20004

Attorneys for Appellee